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No. 425

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

GROUP NO. 1 OIL CORPORATION, *Petitioner,*

v.

JAMES W. BASS, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES FOR THE FIRST DISTRICT OF TEXAS, *Respondent*

PETITION OF THE PETITIONER FOR A REHEARING OF ITS APPLICATION FOR A WRIT OF CERTIORARI

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PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI

Comes now the above named petitioner, Group No. 1 Oil Corporation, and presents this, its petition for a rehearing of its application for a writ of certiorari in the above entitled cause, and, in support thereof, respectfully shows:

Preliminary Statement.

The District Court in an exhaustive and well considered opinion (R. 39) held that petitioner as a lessee of oil and gas lands of the State of Texas was, under the principal authority of Gillespie v. Oklahoma, 257 U. S. 501, an agency of the State of Texas, and its income from the leases was exempt from the Federal income tax. The Circuit Court of Appeals (R. 73) held that the State, by Section 27 of the 1917 Act under

which the leases were granted waived this constitutional right. Section 27 provided that "Rights acquired under this Act shall be subject to taxation as is other property." The Solicitor General opposed the granting of the writ of certiorari on the sole ground that this case involves merely a construction of Section 27 and that the constitutional questions are not presented. His position was that this case involves only the interpretation of a local law and is therefore not a case for the consideration of this court. He does not discuss the correctness of the decision of the Circuit Court of Appeals, but on the other hand admits "there is room for argument" as to its soundness.

We respectfully take issue with the Solicitor General's statement of this case. As will more fully appear herein, this is a case of paramount national importance, affecting not only a number of pending cases from other States but also the whole leasing policy of the State of Texas and other States, and the rights of lessees both present and future of the public domain of Texas and all other States.

The constitutional rights of petitioner are directly presented. To say that the question of whether these rights have been waived precludes a consideration of whether they existed in the first place is to beg the question. It is of no importance to petitioner to have its constitutional rights recognized in theory and then swept away by an erroneous decision that they have been waived.

We respectfully submit the writ of certiorari should be granted for the following reasons:

I.

National Importance of Case.

This case presents questions of great national importance. It is the first case before this court in which a State oil and gas lessee has asserted its constitutional exemption from Federal taxation on the grounds upon which this court in Gillespie v. Oklahoma, 257 U. S. 501, and the five other cases from Oklahoma, has held that similar lessees from the Federal government were exempt from State taxation. This court has consistently applied the same rule to State and Federal instrumentalities. For example, after holding Federal bonds were exempt from State taxation, this court in Pollock v. Farmers Loan & Trust Company, 157 U. S. 429, 584, and other cases, held that State bonds were for like reasons exempt from Federal taxation.

In view of the Oklahoma decisions of this court, lessees from not only Texas but other States have logically assumed that they are exempt from the Federal income tax. Some of them are now litigating this question in various courts, and others will continue until this court affirmatively announces whether the rule enunciated in the Oklahoma decisions will be applied in like manner in favor of these State lessees or not. There are now pending the following cases similar to the present one:

1. E. W. Marland v. United States of America, No. K-322, in the Court of Claims of the United States, in which the petitioner sues to recover income taxes paid on income derived from oil and gas leases granted by the State of Oklahoma on State lands.

2. Coronado Oil & Gas Company v. Commissioner of Internal Revenue, No. 5115, in the Court of Appeals

of the District of Columbia, an appeal from an order of the Board of Tax Appeals sustaining an income tax assessed against the company on income from oil and gas leases on Oklahoma State lands.

3. A. T. Jergins Trust v. Commissioner of Internal Revenue, No. 29940, in the Board of Tax Appeals, in which the petitioner claims its income from oil and gas leases granted by the City of Long Beach, California, is exempt.

4. Hobart Iron Company v. United States, No. 1414, in the United States District Court of North Dakota, Fifth Division, in which plaintiff claims the same exemption for its income from leases of iron ore lands of the State of North Dakota.

5. Big Lake Oil Company v. Heiner, Collector, No. 6159, in the United States District Court for the Western District of Pennsylvania, which is a Texas case similar to this cause.

There may be other cases of which we are not informed. In any event lessees in other States will assuredly claim this same exemption until it is affirmatively passed upon by this court.

A decision in this case on the merits after a full presentation will have an important and decisive bearing upon the above mentioned five specific cases. The denial of the application in this case, particularly in view of the nature of the opposition filed by the respondent, leaves the law in doubt.

It is therefore respectfully submitted that this case is of such national importance that the writ of certiorari should be granted in order that the law upon the subject matter may be clearly and finally settled.

II.

Importance to State of Texas and Texas Lessees.

Even if the national importance of the case is excluded, the case is of such importance to the State of Texas and its lessees as to warrant this court in granting the writ applied for.

The State of Texas is granting from time to time leases upon its public lands. If this court follows its decisions in the long line of Oklahoma cases, as it is assumed it will, and holds petitioner's income is exempt, the State will on all future leases receive larger cash purchase payments and be able to reserve larger royalties, thereby realizing considerably more from its minerals. However, if the record in this case stands as it now is, bidders for leases will not know whether this court denied petitioner's application on the merits or whether on the technical jurisdictional ground presented by respondent in his opposing brief. They therefore will not pay the cash or larger royalties they otherwise would. Although this case has been pressed with the utmost expedition, it has required more than a year and a half to bring it to this point after the claims for refund were filed. At least two years or more will elapse before another test case can be carried through the lower courts and be presented to this court for its decision. If in such case it is finally held the State's lessees are not subject to the Federal income tax, the State of Texas will have lost large sums on leases granted in the intervening years.

The case is of great importance to other lessees of the public lands of Texas. These lessees are divided into three broad classes:

1. Lessees of University of Texas lands under the 1917 Leasing Act.

2. Lessees of University lands under the 1925 or 1929 Leasing Acts, which Acts do not contain the Section 27 of the 1917 Act upon which the Circuit Court of Appeals decided this case.

3. Present and future lessees of Texas public school, asylum and all other public lands.

The Solicitor General in the conclusion of the opposing brief states that the precise question involved is not likely to arise in the future since the Texas legislation in question has ~~not~~ now been repealed. This was an unintentional error upon his part. The 1917 Act embraced all public school, University and Asylum lands and all other State lands. The 1925 and 1929 Acts embraced only University lands and repealed the 1917 Act only as to them. The 1917 Act, with Section 27 thereof, still governs the leasing of all State lands other than University lands. The 1917 Act was brought forward into the Revised Statutes of 1925, because, as the Supreme Court said in Theisen v. Robison, 117 Tex. 489, at 512, in speaking of the two acts:

> "It was proper to include the 1917 Act in the Revised Statutes, as it was proper not to repeal it outright, *because it continued in full effect as to certain classes of land other than University lands.*"

Furthermore, there were many leases granted on University lands themselves between 1917 and 1925 under the Act involved in this case. Therefore, the precise question in this case will arise not only under these other University leases, but also in the case of all other lessees of all State lands other than those of the University, whether heretofore or hereafter granted.

Likewise, lessees of University lands under the 1925 and 1929 Acts will be forced to litigate the question. The decision of the Circuit Court of Appeals in this case, being based on Section 27 of the 1917 Act which does not occur in the later Acts, is not conclusive of their cases, and the denial by this court of the writ of certiorari does not dispose of the fundamental questions involved on their merits.

Specifically this same question will have to be tried anew in the case of Big Lake Oil Company v. Heiner, Collector, above referred to, in which the plaintiff is suing to recover $1,565,000 of taxes paid on income from similar leases. As the amount involved is large for that company, if this case is not finally disposed of on its merits, it will proceed with the prosecution of its case. On the other hand a final decision on the merits in this case will be controlling in, and dispose of, that case.

A decision of this case upon the merits is of great importance to the State. It will also determine the right of all other lessees of Texas State lands, and prevent their being forced to consume the time of the lower courts with further litigation over the point involved. In view of these considerations it is submitted that this is a proper case for consideration by this court.

III.

This Case Does Not Involve Merely the Interpretation of a Local Law But Involves Fundamental Constitutional Questions.

The Solicitor General, in his opposing brief, states that this case involves only the interpretation of local

law that does not warrant the consideration of the court. He further states that if the constitutional question of exemption were directly presented, he would not oppose the petition for certiorari.

In every case of this character this court must perforce construe the State laws governing the leases to determine if the lessees are instrumentalities of the State entitled to the constitutional exemption from Federal taxation. In such construction there is necessarily involved an examination of the State laws for any provision whereby the State has waived this exemption. We believe the Solicitor General, in taking this position, had in mind a case where two parties are in the Federal Courts solely on the ground of diversity of citizenship, and their mutual rights and obligations depend upon the construction of a local State statute with no Federal statutory or constitutional question involved. In such cases this court may well refuse to take jurisdiction and allow the Circuit Court of Appeals' construction to be final. This case is not a similar one in any respect. The constitutional questions and the construction of the applicable State statutes are so interwoven and blended together that they cannot be separated. It is entirely illogical to say the case involves no constitutional question, but is one only of interpretation of a local law, when the first step in determining the constitutional question is the determination of the character of the relation between the lessee and the State government through an interpretation of the State law creating the lessee.

If the rule sought to be involved by the Solicitor General were proper, then this court would be forced to refuse to consider all similar cases involving State les-

sees, as all would depend primarily on the construction of the local leasing laws.

The constitutional questions raised by petitioner are directly presented. The Circuit Court of Appeals based its decision on its holding that, if petitioner were otherwise exempt from Federal taxation, the State, by Section 27, waived that exemption. Whether a constitutional right has been waived is of as fundamental importance as the question of whether the right existed in the first instance. This is particularly true in this case, where the constitutional right involved has been recognized by this court to be of such gravity that it has been read into the Constitution solely by implication. If the statement of the Solicitor General were correct, then in each case where a Circuit Court of Appeals holds a party has a constitutional right but has waived it, its decision would be final, regardless of how erroneous it might be. A litigant obtains no relief from a recognition of his constitutional rights followed by an untenable holding that he has waived them.

We submit the Circuit Court of Appeals' construction of Section 27 is wholly untenable, and it does not apply to Federal taxation. The Solicitor General admits "there is room for argument" on this point, but opposes the petition for certiorari on the ground that "it is a question of interpretation of local law which does not warrant the consideration of this court." Under such a rule no taxpayer situated as petitioner is could ever obtain relief from an erroneous decision of the lower courts.

We submit that the constitutional right of petitioner to be exempt from Federal taxation is directly presented to this court, that the case is not one involving merely

the interpretation of local law, and that it is one deserving of review by this court.

IV.

The Petitioner, as an Instrumentality of the State of Texas, Is Not Subject to the Federal Income Tax On Its Income From Its State Leases.

We have presented fully our contentions on this proposition under points A, B and C of our brief in support of the petition for certiorari. We are unable to distinguish Gillespie v. Oklahoma, 257 U. S. 501, and the other Oklahoma cases referred to in our brief. This court has stricken down the many different taxes the State of Oklahoma has attempted to levy on the United States oil and gas lessees as being taxes on Federal instrumentalities. It is well established that the instrumentalities of the States are for like reasons and to the same extent exempt from Federal taxes. Pollock v. Farmers Loan & Trust Company, 157 U. S. 429, 584; The Collector v. Day, 11 Wall. (78 U. S.) 113, 127; Ambrosini v. United States, 187 U. S. 1, 7. Petitioner is an oil and gas lessee used by the State of Texas as a means of developing the State's resources for the State's benefit. The United States in its treaty with the Republic of Texas expressly guaranteed the State of Texas should retain its public domain and use it for such purposes as it desired, free from interference on the part of the United States. Under the Gillespie decision these Federal income taxes are an unauthorized burden on this right of the State.

The constitutional exemption urged by petitioner has been recognized in innumerable decisions of this court

and the lower courts since M'Culloch v. Maryland, 4 Wheat. 316 in 1819. It has been particularly emphasized by this court in the last ten years. In addition to the Oklahoma lessee cases of Choctaw, Oklahoma & Gulf Railway Company v. Harrison, 235 U. S. 292, Indian Territory Illuminating Oil Company v. Oklahoma, 240 U. S. 522, Howard v. Gipsy Oil Company, 247 U. S. 503, Large Oil Company v. Howard, 248 U. S. 549, Gillespie v. Oklahoma, *supra*, and Jaybird Mining Company v. Weir, 271 U. S. 609, it has invoked the principle in striking down State taxes and regulations in Johnson v. Maryland, 254 U. S. 51, First National Bank v. Adams, 258 U. S. 362, First National Bank v. California, 262 U. S. 366, Childers v. Beaver, 270 U. S. 555, Miller v. Milwaukee, 272 U. S. 713, Northwestern Mutual Life Insurance Company v. Wisconsin, 275 U. S. 136, Long v. Rockwood, 277 U. S. 142, Panhandle Oil Company v. Knox, 277 U. S. 218, and Graysburg Oil Company v. Texas, 278 U. S. 582, and a provision of the United States Revenue Act of 1921 in National Life Insurance Company v. United States, 277 U. S. 508. This court particularly stressed the imperative necessity of this constitutional principle in The Macallen Company v. Massachusetts, 279 U. S. 620.

We respectfully submit that under these cases and especially Gillespie v. Oklahoma, *supra*, petitioner is entitled to the exemption claimed.

V.

These Constitutional Rights of Petitioner Were Not Waived By Section 27.

The Circuit Court of Appeals held that by Section 27 of the 1917 Act reading:

"Rights acquired under this Act shall be subject to taxation as is other property."

gave the United States the right through taxation to control, hamper, impede and, if it desired, destroy these instrumentalities that the State had created to develop its own mineral resources. Under Point D of our brief we have thoroughly discussed this point, and will not repeat our remarks. Neither State nor Federal government may tax the other's agencies without its clear, unequivocal and express consent. Van Brocklin v. Tennessee, 117 U. S. 151, 175; Owensboro National Bank v. Owensboro, 173 U. S. 664, 668; Jaybird Mining Company v. Weir, 271 U. S. 609, 613; First National Bank v. Adams, 258 U. S. 362, 364; Heiner v. Colonial Trust Company, 275 U. S. 232, 234-5. This Section 27 contains no reference to Federal taxation, and no consent by the State to the levy of these Federal taxes can possibly be read into it.

As pointed out in our brief the section was passed because of litigation then pending in the Texas courts in which oil lessees contended their leasehold estates did not come within the definition of taxable property as enumerated in the general taxing laws. It was inserted to insure that these lessees would pay State and County advalorem taxes on their leases, and the construction thereof by the Circuit Court of Appeals is erroneous.

Furthermore, we submit, as pointed out in Point E of our brief, this section was repealed as to University leases by the Act of March 10, 1925, prior to any of the taxes in this case having become due or payable.

Conclusion.

We sincerely believe that this case is of such national

importance that, if decided on the merits after full presentation, it will become the leading case on the questions involved and assume the great authority that is now attributed to Gillespie v. Oklahoma and its connected cases on the questions they decided. It will have an important bearing on the various cases above mentioned that have now arisen in other States. It will establish definitely the law as to present and future lessees of Texas' public domain. It will be of decided benefit to the State of Texas in establishing its schedules of royalties on leases granted in the future.

In view of all these grave considerations we respectfully request this court to grant the petition for a writ of certiorari, and hear this case upon its merits.

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Of Counsel:
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Houston, Texas.

I, Homer L. Bruce, Counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of its application for a writ of certiorari is presented in good faith and not for delay.

HOMER L. BRUCE,
Counsel for Petitioner.